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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JASON QUILES, Defendant and Appellant.	A119615 (San Francisco County Super. Ct. No. 199002)

Jason Quiles appeals from a judgment of conviction and sentence imposed after a jury convicted him of multiple crimes. He contends: (1) his constitutional rights were violated when the court imposed the upper term of sentence based on his prior juvenile adjudications; (2) testimony that Quiles told a nurse he was going to "have one of the witnesses smacked" improperly tainted the case against him; (3) his defense attorney provided ineffective assistance of counsel by failing to object to the prosecutor's closing argument; and (4) the court should have severed a grand theft charge from his more serious charges.

In the published portion of our opinion, we conclude that the trial court did not err in imposing the upper term of sentence. Prior juvenile adjudications may be used in imposing the upper term under California Rules of Court, rule 4.421(b)(2). In evaluating whether juvenile adjudications are of increasing seriousness, the court may consider the elements of the respective offenses. In the unpublished portion of our opinion, we conclude that the remainder of Quiles' contentions lack merit. We will affirm the judgment.

* Pursuant to California Rules of Court, rules 8.1105 and 8.1110, this opinion is certified for publication with the exception of parts II B, C, and D.

I. FACTS AND PROCEDURAL HISTORY

A second amended information charged Quiles as follows: count one, grand theft (Pen. Code, § 487, subd. (c)) on October 8, 2005; counts two three, four, and nine, second degree robbery (§ 212.5) on October 18, 2005; counts 6 and 11, assault with a firearm (§ 245, subd. (a)(2)) on October 18, 2005; count 7, attempted robbery (§§ 212.5, 664) on October 18, 2005; and counts 12 and 13, second degree robbery (§ 212.5) on October 14, 2005. [1] Additional counts for attempted murder (§§ 187, 664) and dissuading a witness (§ 136.1, subd. (c)(1)) were dismissed under section 995.

The second amended information further alleged that the robberies were serious offenses (§ 1192.7, subd. (c)(19)), Quiles was armed with a firearm during five of the robberies (§ 12022, subd. (a)(1)), and he personally used a firearm (§ 12022.53, subd. (b)) during the commission of count four and count 12.

The trial court denied Quiles' motion to sever the charges. The matter proceeded to a trial by jury.

A. *Evidence at Trial*

1. *Grand Theft of Sundin (Count 1)*

Around 3:30 p.m. on October 8, 2005, Kelly Sundin was in a coffee shop working on her laptop computer. A young African-American man (Quiles) "swooped in and grabbed" the laptop from her hands. Sundin reached out to grab the laptop back, but Quiles ran out of the coffee shop with the computer. Sundin ran after Quiles but was unable to catch him.

Jeremy Tooker, the owner of the coffee shop, saw the "tussle" between Sundin and Quiles over the laptop. After Quiles ran out the door, Tooker chased him for two blocks and saw him get into a white hatchback car, with an African-American woman in the driver's seat. Tooker told Quiles to "give it up" because he had memorized the car's license plate. Quiles responded "so what" and instructed the driver to leave. A car had stopped on the street, blocking Quiles' vehicle from leaving the parking place; the driver

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[1] Except where otherwise indicated, all statutory references are to the Penal Code.

of Quiles' car drove onto the sidewalk for about a half a block before returning to the street and speeding away.

Inspector Steve Mulkeen investigated the theft and issued a teletype with a description of the getaway car and its license plate. About ten days after the crime, he learned the getaway car had been towed. Quiles' interim driver's license was found inside the car.

Tooker identified Quiles in a photographic lineup, at the preliminary hearing, and at trial.

2. *Robbery of Hyde and Casillas (Counts 2-3)*

Around 4:15 p.m. on October 18, 2005, Alexander Hyde and Diego Casillas were walking on Haight Street planning to take pictures for a photography class. A white car pulled up and screeched to a halt. Quiles got out of the car and walked towards Casillas. Getting so close to Casillas that their foreheads touched, Quiles yelled profanities at Casillas and took his camera.

At Quiles' prompting, the driver of Quiles' vehicle displayed the grip of a black, automatic handgun in his pocket. Quiles grabbed Hyde's camera and pushed him, saying, "Give me some money." Hyde claimed he did not have any and gave Quiles his wallet, which contained no money. Quiles pushed him again and said, "Where is the money."

Quiles eventually returned to the car and told the driver that Hyde and Casillas had seen the car's license plate. Quiles approached Hyde again, took the driver's license from Hyde's wallet, and told Hyde that if he went to the police, "someone would come to [his] house." Quiles then got in the car and left, and Hyde telephoned the police.

Later that afternoon, the police took Hyde and Casillas to a location where a white Chevy Caprice had crashed. The car was registered to Quiles. Casillas and Hyde identified the car as the one used in the robbery and saw their cameras on the car's floorboard. The car contained an insurance payment coupon and insurance identification card in Quiles' name, as well as Hyde's driver's license.

Hyde and Casillas identified Quiles in a photographic lineup and in court.

3. *Robbery of Rabahat and Reynoca (Counts 4, 6, 7, 9, 11)*

Around 4:25 p.m. on October 18, 2005—about ten minutes after the robbery of Hyde and Casillas—Nael Rabahat observed two African-American males enter his store. One of the men (purportedly Quiles) held a gun about two inches from Rabahat's head and said, "Give us all the money." The robbers emptied the cash register of approximately $1,400-$1,500. While Quiles held Rabahat at gunpoint, his accomplice went to the back of the store and filled a green garbage can with about 30 cartons of cigarettes. When the accomplice returned with the cigarettes, he said, "I'm done. Shoot the son of a bitch." The gun Quiles was pointing at Rabahat's head then made a "ticking sound." Terrified, Rabahat pushed Quiles away and ran out of the store. Quiles and his accomplice fled.

After viewing a video lineup, Rabahat was 100 percent sure Quiles was one of the two robbers and about 75 percent sure Quiles was the man who had the gun. Rabahat also identified Quiles in court. In addition, Rabahat identified a trashcan full of cartons of cigarettes that were found in Quiles' car.

Mark Brown testified that he pulled up to the store and saw Rabahat run outside, screaming, "Call the police. Dial 911." Brown dialed 911 as he was parking his car. Suddenly an African-American man "threw himself" into the passenger side of his car and tried to grab Brown's phone. The man also knocked Brown's glasses off and "went for" Brown's car keys. Brown managed to hang on to his cell phone and drove away without his glasses.

Marlon Reynoca had parked his oxygen delivery truck nearby around 4:30 p.m. While he was at his truck, he was accosted by Quiles, who ordered him to hand over his money. Reynoca handed Quiles $40. Reynoca then saw Quiles take a telephone from Reynoca's customer and throw it toward a Caucasian man. The Caucasian man tackled Quiles, and they briefly fought on the ground. About a month after the incident, Reynoca

identified Quiles in a video lineup as his assailant; he was unable to identify the assailant at trial.

Cathy Choy, Reynoca's oxygen delivery customer, looked out her window and saw Quiles and Reynoca. Choy grabbed her cordless telephone and went to her doorway to see what was happening. As Choy emerged from her home, Quiles grabbed the phone away from her. Choy went back inside and slammed the door shut. Choy then heard two gunshots. Choy identified Quiles in a video lineup as the man who grabbed her phone, but she did not recognize anyone in the courtroom at trial.

Choy's neighbor, Christie Davis, saw Quiles running past her house, pursued by a Caucasian man. The Caucasian man tackled Quiles, and the two briefly struggled on the ground. Another African-American man, who had been stuffing a trash can into a car, pulled out a gun. The Caucasian man ran back in the direction from which he had come, and then the African-American man shot at him. Both African-American men sped away in the car. Davis could not identify anyone in the courtroom at trial.

Pete Blanco, the man who tackled Quiles, was sitting in his truck in front of Rabahat's store around 4:30 p.m. when he saw two African-American men run out of it. Rabahat ran out and yelled to call 911; he also confirmed to Blanco that he was being robbed. One of the African-American men, carrying a green garbage can filled with store products, dropped the can and tried to jump through the window of a red car parked across the street, but was thrown out of it. The other African-American man (Quiles) was dressed all in black; Blanco chased after him. The man threw something at Blanco, hitting his thigh and leaving a large bruise shaped like a cell phone. Blanco tackled Quiles and "pinned him to the ground." Blanco looked up and saw another African-American man running toward him with a gun. Blanco jumped off of Quiles and began running away. Blanco heard Quiles yell repeatedly, "Shoot the mother fucker." Blanco heard two gunshots. After briefly taking cover, Blanco saw Quiles jump into a white Chevy Caprice and take off. Blanco jumped in his truck, "spun it around," and gave chase. Quiles' car struck parked cars, became temporarily stuck under a truck it had hit,

and took off again. Blanco followed a trail of fluids leaking from Quiles' car and eventually found it abandoned in a cul-de-sac.

Rabahat's stolen cigarettes were located inside the wrecked car. Quiles' fingerprints were found on eight of the cigarette cartons. Police located two nine-millimeter shell casings on the street near the robbery scene, as well as 67 rounds of the same ammunition inside Quiles' car.

4. *Threat to Have Witness "Smacked"*

On July 20, 2007, Crystal Murphy was working as a nursing assistant at San Francisco General Hospital. Murphy was assigned to monitor Quiles, who was in a locked facility inside the hospital for a tooth extraction. Quiles told Murphy that he was in prison for a serious crime. Quiles further stated, in Murphy's words, that "he was going to be getting out soon, and his partner was – he was going to have one of the witnesses smacked, and his partner was waiting on him – I mean working on him." Later that night, Murphy told the sheriff about the conversation.

B. *Jury Verdict and Sentence*

The jury found Quiles guilty of grand theft, four counts of second degree robbery, and two counts of assault with a firearm. Quiles was acquitted of the two robberies allegedly committed on October 14, 2005 (counts 12 and 13), and the jury found the personal use of a firearm allegation not true. (The prosecution had dismissed count seven, attempted robbery, during trial.)

The court sentenced Quiles to an aggregate term of 12 years four months, consisting of: the upper term of five years on count two of second-degree robbery; consecutive sentences of one-third the middle terms on each additional count; plus enhancements for being armed with a firearm (§ 12022, subd. (a)(1)). The upper term on count two was imposed on the ground that Quiles' two prior sustained juvenile petitions were numerous or increasing in seriousness.

This appeal followed.

II. DISCUSSION

As mentioned, Quiles contends: (1) imposition of the upper term of sentence based on his prior juvenile adjudications was unconstitutional; (2) Murphy's testimony about Quiles having a witness "smacked" was inadmissible; (3) defense counsel provided ineffective assistance of counsel; and (4) the court should have severed the count one grand theft charge from the other charges. We consider each in turn.

A. *Imposition of the Upper Term of Sentence*

Under rule 4.421(b)(2) of the California Rules of Court, an upper term of sentence may be imposed where "[t]he defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness." (See *In re Christopher B.* (2007) 156 Cal.App.4th 1557, 1564.) The trial court imposed the upper term of five years on the second degree robbery charge based on Quiles' "prior sustained petitions for burglary and robbery" incurred as a juvenile.

1. *Use of Juvenile Adjudications Under Rule 4.421(b)(2)*

Quiles contends the court's use of his prior juvenile adjudications to impose the upper term under rule 4.421(b)(2) was unconstitutional. Because juvenile adjudications lack the procedural protections of adult convictions such as the right to a jury trial, Quiles urges that they do not fall within the recidivism exception to the requirement that the upper term be based on facts found by a jury to be true beyond a reasonable doubt. (See, e.g., *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*); *Cunningham v. California* (2007) 549 U.S. 270, 274-275 (*Cunningham*).)

The constitutionality of using prior juvenile adjudications to enhance an adult offender's sentence was recently decided by our Supreme Court in *People v. Nguyen* (2009) 46 Cal.4th 1007. At issue in *Nguyen* was whether a prior juvenile adjudication could be used to increase an adult felony offender's maximum sentence under California's Three Strikes Law (§§ 667, subd. (d)(3), 1170.12, subd. (b)(3)). (*Nguyen*, at p. 1010.) The court explained that *Apprendi* and its progeny (including *Cunningham*) held that a defendant has a constitutional right to a jury finding beyond a reasonable

doubt on any fact used to impose an aggravated sentence for a felony. (*Ibid*.) *Apprendi* recognized an exception for the fact of a prior conviction, since recidivism is a traditional basis for increasing a sentence and, unlike an element of an offense, recidivism relates not to the current offense but solely to punishment. (*Id.* at p. 1011.) The defendant in *Nguyen* claimed that *Apprendi*'s recidivism exception did not apply to prior juvenile adjudications because juvenile proceedings do not afford the right to a jury trial. (*Ibid*.) Our Supreme Court in *Nguyen* held: "[T]he absence of a constitutional or statutory right to jury trial under the juvenile law does not, under *Apprendi*, preclude the use of a prior juvenile adjudication of criminal misconduct to enhance the maximum sentence for a subsequent adult felony offense by the same person." (*Id.* at p. 1028.)

Although *Nguyen* did not involve the use of prior juvenile adjudications to establish an aggravating factor under rule 4.421(b)(2), it clearly held that there was no constitutional barrier to using prior juvenile adjudications, like prior adult convictions, to increase the term of sentence under the recidivism exception without the need for a jury to find the prior adjudications beyond a reasonable doubt. *Nguyen* is therefore dispositive of the issue before us.[2]

2. *Numerosity or Increasing Seriousness*

Quiles further argues that, even if juvenile adjudications could be used to impose the upper term sentence, his two prior sustained petitions were insufficient to support the

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[2] The parties to this appeal filed their appellate briefs before our Supreme Court issued its decision in *Nguyen*. Quiles relied on *U.S. v. Tighe* (9th Cir. 2001) 266 F.3d 1187 (*Tighe*), which ruled: "Juvenile adjudications that do not afford the right to a jury trial and a beyond-a-reasonable-doubt burden of proof, therefore, do not fall with *Apprendi's* 'prior conviction' exception." (*Id*. at p. 1194.) *Tighe* has not been well-received. Indeed, the Ninth Circuit in *Boyd v. Newland* (9th Cir. 2004) 393 F.3d 1008, noted the authority contrary to *Tighe* in California and other federal circuits, and concluded: "we cannot hold that the California court's use of Petitioner's juvenile adjudication as a sentencing enhancement was contrary to, or involved an unreasonable application of, Supreme Court precedent." (*Id*. at p. 1017.) In any event, our Supreme Court's decision in *Nguyen* now governs the matter.

upper term in this case, because they were not numerous or of increasing seriousness. (Cal. Rules of Court, rule 4.421(b)(2).)

According to the probation report, Quiles suffered a sustained juvenile petition for burglary in December 1999 and a sustained juvenile petition for second degree robbery in April 2002. Quiles argues, and respondent does not dispute, that two prior adjudications are not "numerous" within the meaning of Cal. Rules of Court, rule 4.421(b)(2).

It was reasonable for the trial court to conclude, however, that Quiles' prior juvenile adjudications were of increasing seriousness. Burglary does not require proof of force, fear, or violence. (§ 459.) Robbery, however, involves taking personal property with "force or fear." (§ 211.) In addition, robbery is classified as both a serious felony (§ 1192.7, subd. (c)(19)) *and* a violent felony (§ 667.5, subd. (c)(9)), while second degree burglary is neither, and even first degree burglary is not a violent felony without further proof (§ 667.5, subd. (c)(21)). Since robbery is by definition more serious than burglary, and Quiles' robbery occurred after his burglary, it is apparent from the face of the record that Quiles' prior juvenile adjudications were of increasing seriousness.

Quiles argues that the relative seriousness of prior offenses must be gauged only by the range of sentence that could have been imposed for each offense. (See *People v. Black* (2007) 41 Cal.4th 799, 820 [court may determine relative seriousness of the offenses by "reference to the range of punishment provided by statute for each offense"].) In this case, he maintains, his 1999 burglary adjudication could have been for first degree burglary or second degree burglary. If it was for first degree burglary, the upper range of sentence would have been six years (§ 461), which would be more than the upper range of sentence for his subsequent second-degree robbery (five years under section 213, subdivision (a)(2)). Under this theory, Quiles' juvenile offenses would be of *de*creasing seriousness. Because it was unclear from the record whether the 1999 burglary was in the first or second degree, Quiles urges, the trial court did not have a sufficient basis for concluding his prior juvenile adjudications were of increasing seriousness.

We disagree. The court in *Black* did not *require* trial courts to determine the relative seriousness of prior offenses solely by their respective range of sentence. The

court stated: "The determinations whether a defendant has suffered prior convictions, and whether those convictions are 'numerous or of increasing seriousness' (Cal. Rules of Court, rule 4.421(b)(2)), require consideration of only the number, dates, and offenses of the prior convictions alleged. The relative seriousness of these alleged convictions *may* be determined simply by reference to the range of punishment provided by statute for each offense. This type of determination is 'quite different from the resolution of the issues submitted to a jury, and is one more typically and appropriately undertaken by a court.' [Citation.]" (*Black, supra*, 41 Cal.4th at pp. 819-820, italics added.) The fact that the relative seriousness of offenses "*may* be determined simply by reference to the range of punishment provided by statute" does not mean the trial court must close its eyes to the statutory definition of the offenses themselves. To the contrary, the trial court is required to consider the "number, dates, and *offenses*" constituting the alleged priors. (*Id*. at p. 820, italics added.) Nothing in *Black* precludes the trial court from evaluating the relative seriousness of prior offenses from aspects of the record other than the respective ranges of punishment – such as the elements of those offenses – particularly where the range of punishment for the offenses was not clarified by the parties in the trial court. Like a comparison of the offenses' respective punishments, a comparison of the offenses' respective elements is the "type of determination . . . more typically and appropriately undertaken by a court." (*Black*, at pp. 819-820.)

Quiles fails to establish error in the court's imposition of the upper term of sentence.

B. *Murphy's Testimony About Having a Witness Smacked*

Before trial, Quiles moved to exclude nurse Murphy's testimony that Quiles was going to "have one of the witnesses smacked." His attorney claimed the testimony was inadmissible character evidence under Evidence Code section 1101 and was unduly prejudicial under Evidence Code section 352. The prosecutor responded that the evidence was offered as an admission of the defendant and as consciousness of his guilt,

not under Evidence Code section 1101. The court denied the motion on that basis. We review for an abuse of discretion. (*People v. Harrison* (2005) 35 Cal.4th 208, 230.)

Quiles' statement was probative of his consciousness of guilt. The statement that he was in prison for a serious crime but would soon be released because he was going to have one of the witnesses "smacked" could reasonably be interpreted to reflect Quiles' understanding that he would be found guilty of that serious crime unless a witness was dissuaded from, or incapable of, testifying. This is consciousness of guilt. [3]

Quiles argues that his statement to Murphy was different from the type of threats courts normally consider to be admissible as a defendant's admission in this context, because his statement was not a threat made directly to a witness, or even a statement to someone who would pass on the information to intimidate a witness. Instead, he was merely confiding in a nurse. Quiles also notes that his conversation with Murphy occurred nearly two years after the incidents, and there was more than just one witness to his crimes. Therefore, he urges, his statement should have been excluded as irrelevant because it supplied only a speculative inference of guilt.

We disagree. While the probative value of a threat made directly to a witness may be greater than the probative value of a statement to a nurse *about* witness intimidation, the latter is nonetheless probative of a defendant's consciousness of guilt.

Quiles' reliance on *People v. Hovarter* (2008) 44 Cal.4th 983 in this regard is misplaced. There, the appellant argued that his statements were inadmissible because they were too speculative to support an inference that he had previously committed similar crimes. (*Id*. at p. 1009.) Our Supreme Court ruled, however, that the trial court was within its discretion in concluding the statements permitted such an inference, since the trial court's decision was "not 'arbitrary, capricious, or patently absurd' such that it 'resulted in a manifest miscarriage of justice.' [Citation.]" (*Ibid*.) We reach the same conclusion with respect to the evidentiary ruling of the trial court in this matter.

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[3] Quiles' statement was not rendered inadmissible by the hearsay rule, because the prosecution was offering it as a statement by the defendant. (Evid. Code, § 1220.)

Next, Quiles points out that the prosecutor argued to the jury that Quiles' threat not only showed consciousness of guilt, but was also relevant to his identity – that he was the one who perpetrated the crimes—in another way: it was consistent with the angry "attitude that [was] prevalent at every crime scene." Quiles contends Murphy's statement was not admissible as identity evidence under Evidence Code section 1101, subdivision (b), because there was insufficient commonality between the charged and uncharged offenses. (See *People v. Medina* (1995) 11 Cal.4th 694, 748.)[4]

Quiles argument lacks merit. As he acknowledges, if the statement qualifies as a defendant's admission probative of consciousness of guilt in committing the *charged* crime, the prosecution need not establish the type of signature evidence required for evidence of *uncharged* acts to show identity under Evidence Code section 1101, subdivision (b). (*People v. Robinson* (2000) 85 Cal.App.4th 434, 445.) Furthermore, because the evidence was admissible as consciousness of guilt without resort to Evidence Code section 1101, and because the trial court did not rely on Evidence Code section 1101 in admitting it, whether Quiles' statement would have been admissible under Evidence Code section 1101 is immaterial. To the extent Quiles believes the prosecutor improperly *used* the statement for purposes other than the purpose for which it was admitted at the trial, the question is not the admissibility of the evidence but the subsequent conduct of the prosecutor. (We address the issue of defense counsel's failure to object to the prosecutor's statement *post*.)

Lastly, the court did not abuse its discretion in overruling Quiles' objection under Evidence Code section 352. Just as the probative value of a statement to a nurse about witness intimidation may be less than the probative value of a threat directly to a witness, the degree of prejudice is less as well. It has not been shown, based on the record before us, that the trial court was irrational or arbitrary in its ruling; Quiles has therefore not

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[4] Evidence Code section 1101, subdivision (a), prohibits the admission of other bad acts to prove a defendant's disposition to commit a charged crime. Evidence Code section 1101, subdivision (b), permits evidence of such acts when relevant to prove facts such as identity.

established an abuse of discretion in the court's admission of his statement that he would have a witness "smacked."

C. *Ineffective Assistance Claim*

Quiles contends his trial attorney did not provide effective assistance of counsel because he did not object to the prosecutor's closing argument in two respects. First, he maintains, his trial attorney should have objected when the prosecutor argued, for example, that Quiles wanted to "smack the witness*es*" against him and that "[t]wo years [after the crimes Quiles] is still threatening to off his witness*es*," because Murphy actually testified that Quiles said he was going to "have *one* of the witnesses smacked." In addition, Quiles insists that his attorney should have objected when the prosecutor argued that Quiles' threat to have a witness smacked was relevant to the identification of Quiles as the perpetrator of the crimes, despite an earlier representation to the court that he was not introducing Quiles' statement under Evidence Code section 1101.

In the relevant portion of the prosecutor's closing argument, the prosecutor discussed the significance of Quiles' threat: "[Quiles said,] 'I'm getting out because my partner on the outside is going to "smack the witnesses against me." ' That has evidentiary significance. How can you use it? It shows Mr. Quiles' consciousness of guilt. It shows his effort to suppress evidence. And what could be more suppressing of evidence than killing the witnesses against you?" Defense counsel objected that there was no evidence of any "attempt," and the court instructed the jurors: "it is the attorney's interpretation so you can take whatever you believe 'smack the witness' means." The prosecutor then argued that Quiles' statement also "helps prove the identity of our robber. Because the defendant says to the nurse, 'My partner will smack the witnesses.' " The prosecutor pointed out that the perpetrator of the Casillas robbery used the word "partner." After proceeding to describe the mountain of evidence pointing to Quiles as the perpetrator of the charged crimes, he noted the brutality and gratuitous violence of the crimes, including that Quiles yelled "shoot the mother fucker" when caught by Blanco

and " two years later" he was "still threatening to off his witnesses to [Nurse] Murphy." Defense counsel did not object.

To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) counsel's performance was deficient because his representation fell below an objective standard of reasonableness under prevailing professional norms; and (2) prejudice flowing from counsel's performance or lack thereof. (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437.) We will focus on the issue of prejudice.[5]

Prejudice requires a showing that, as a result of counsel's errors, the trial was unreliable or fundamentally unfair. " 'The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " (*In re Cudjo* (1999) 20 Cal.4th 673, 687.)

As to the prosecutor's reference to smacking the "witnesses" instead of one of the witnesses, the trial court promptly instructed the jury that the prosecutor's comments amounted only to his "interpretation" of the evidence and that the jury had to decide for itself what "smack the witness" meant. The court also instructed the jury, before its deliberations, that the jury had to decide what the facts were and that the attorneys' statements were not evidence: "You must decide what the facts are in this case. You must use only the evidence that was presented in this courtroom. 'Evidence' is the sworn testimony of witnesses, exhibits admitted into evidence, and anything else I told you to consider as evidence. [¶] *Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence*. Their questions are not evidence. Only the witnesses' answers are evidence." (Italics added.) Thus, even without defense counsel's objection, and even if it would really make a difference whether Quiles was going to have one witness smacked

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[5] We note, however, that a reasonable defense attorney might well conclude, after objecting to the prosecutor's statement and hearing the court instruct the jurors that they were to decide what "smack the *witness*" means, that there would be no benefit to objecting to the prosecutor's use of the phrase, "smack the *witnesses*," and drawing further attention to the statement.

or more than one, the jury knew it had to determine from the evidence what Quiles said and what he meant by it. In this context, counsel's failure to object to the prosecutor's statement did not result in such great prejudice that it undermined the proper functioning of the adversarial process.

Nor did such prejudice arise from counsel's failure to object to the prosecutor's use of Quiles' statement to argue that Quiles was, indeed, the one who perpetrated the robberies. As discussed *ante*, the evidence of Quiles' statement to Murphy was admissible to show Quiles' consciousness of guilt in perpetrating a serious crime. A reasonable inference from this evidence was that Quiles was conscious of his guilt with respect to the robbery of Rabahat. For the prosecutor to argue that Quiles was the particular Rabahat robber who told his cohort to shoot Blanco was a fair comment on the admissible evidence. Moreover, Blanco testified that Quiles *was* the robber who urged the accomplice to shoot him, and Casillas and Hyde identified Quiles as the one who robbed them of their cameras. Because there was plentiful direct evidence of Quiles' commission of the robberies, defense counsel's objection to the prosecutor's comment would not have materially advanced his defense.

Quiles nonetheless contends that his counsel's failure to object was prejudicial because, he claims, the main weakness in the prosecution's case was the inability of many witnesses to identify Quiles as the man involved in the crimes. He argues that, by falsely multiplying the number of witnesses apparently at risk, and by claiming that Murphy's testimony reinforced the other witnesses' identification of Quiles, the prosecutor made it easier for the jury to find that Quiles was the perpetrator.

We disagree strongly. While Sundin was unable to identify her assailant, Tooker identified Quiles as Sundin's assailant in a photographic lineup, at the preliminary hearing, and at trial. As to the robbery of Hyde and Casillas, both Hyde and Casillas identified Quiles in a photographic lineup and in court. As to the robbery of Rabahat, Rabahat was 100 percent sure Quiles was one of the two robbers and about 75 percent sure he was the man who had the gun, based on a video lineup, and he identified Quiles in court as well. Rabahat also identified a trashcan of cigarette cartons found in Quiles'

car, and several of those cartons bore Quiles' fingerprints. Although Choy and Reynoca could not identify Quiles as one of the robbers at trial, Reynoca identified Quiles in a video lineup just a month or so after the robbery. Furthermore, the crimes were committed using Quiles' car, which contained the stolen property as well as identification cards bearing Quiles' name. Under these circumstances, an objection to the prosecutor's use of Quiles' statement to Murphy would not have changed the outcome, and it certainly did not undermine the adversarial process.

Quiles also argues that his counsel's failure to object to the prosecutor's statements was prejudicial because it precluded him from challenging his conviction on the ground of prosecutorial misconduct. The inability to appeal the conviction on the ground of prosecutorial misconduct, however, is not prejudicial, since for the reasons we have stated there was no cognizable claim of prosecutorial misconduct for which reversal would have been required.

Quiles fails to establish ineffective assistance of counsel.

D. *Severance*

Before trial, Quiles requested three separate trials for his crimes, which occurred on three dates: October 8, 2005; October 14, 2005; and October 18, 2005. The court refused to sever the October 8 grand theft charge (count one) from the other charges, finding that all the charges fell within the same class of crimes, occurred in the same general time period, and involved a similar mode of escape. Quiles contends it was error not to sever the count one grand theft charge.[6]

There is no dispute that joinder of the charges was statutorily permissible because they all involved theft and were thus in the same class of crimes under section 954. A trial court may nonetheless order severance of such joinable offenses under section 954 "in the interest of justice and for good cause shown." Severance of the charges may be

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[6] Quiles does not take issue with the court's refusal to sever the crimes allegedly occurring on October 14, of which Quiles was acquitted.

constitutionally required only if joinder "would be so prejudicial that it would deny a defendant a fair trial." (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1243-1244.)

Factors to consider in reviewing a court's denial of a severance motion include: "(1) the cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital case. [Citation.]" (*People v. Mendoza* (2000) 24 Cal.4th 130, 161.)

Respondent contends that evidence of a similar mode of escape – a getaway vehicle – was cross-admissible. In the grand theft crime, Quiles had a crime partner waiting in a white getaway car ready to transport him from the crime scene. In the Hyde and Casillas robbery, his partner acted as a getaway driver in the same vehicle. The Rabahat and Reynoca robberies also involved flight in the getaway vehicle. However, we question whether this is *cross*-admissible evidence—where certain evidence is admissible as to all charges—or merely an instance where evidence that is admissible as to one charge is similar to other evidence that is admissible as to another charge.

Nonetheless, whether or not there was cross-admissible evidence, it was not an abuse of discretion for the trial court to decline to sever the counts. This was not a case in which one of the charges was a capital offense. It was not a case in which some of the *charges* would unusually inflame the jury against the defendant. Nor was it a situation in which a weak case was joined with a strong case, or two weak cases were joined so the total evidence might alter the outcome. To the contrary, evidence of Quiles' guilt on the grand theft count was as strong as the evidence of his guilt on the robbery counts.

In the grand theft count, Tooker saw Quiles take the laptop, followed him to Quiles' getaway car, saw the license plate, saw Quiles, and identified him as the perpetrator in a video lineup. Quiles' temporary driver's license was later found in the car. In the robbery counts, the cameras stolen from Hyde and Casillas, as well as Hyde's stolen driver's license, were discovered in Quiles' vehicle. Rabahat identified the trash

can full of cigarettes that were taken during the robbery, and Quiles' fingerprints were on eight of the cigarette cartons. Quiles was identified as the perpetrator in these robberies by numerous witnesses, including Hyde, Casillas, Rabahat, and Reynoca.

Quiles argues that the inflammatory nature of some of the charges compelled severance, because the grand theft involved a computer-snatching by an unarmed man who made no threats, while the other charges involved two armed men with inflammatory testimony regarding threats to shoot victims or witnesses, including repeatedly yelling at his armed accomplice to "[s]hoot the motherfucker" who tried to apprehend him. Quiles' motion to sever, however, did not apprise the court that there might be testimony that Quiles told his accomplice to "[s]hoot the motherfucker." In any event, the evidence associated with the robberies was not so inflammatory that it would create a danger of the jury violating its sworn duty and convicting Quiles of stealing a laptop merely because on another occasion he told his cohort to shoot somebody.

Furthermore, Quiles' *acquittal* on the October 14 charges, which were also included in the trial, suggests the jury did not act out of passion or prejudice when it considered the evidence. From this, as well as the overwhelming evidence of Quiles' guilt on count one, it is apparent that any error in denying severance of count one was harmless.

Quiles fails to establish a prejudicial abuse of discretion in the trial court's refusal to sever count one from the other charges.

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

SIMONS, Acting P. J.

BRUINIERS, J.

Trial court:	San Francisco City and County Superior Court
Trial judge:	Hon. Teri L. Jackson

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